No. 88-1781 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,
Petitioner,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,
Respondents,

and

LONE STAR STEEL COMPANY,
Respondent,

IPSCO, INC. and IPSCO STEEL, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITION

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988

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
ARGUMENT	3
I. The ITC Is Incorrect in Using Fairly Traded Imports to Determine "Material Injury."	3
II. Unless Remedied by this Court, the Federal Circuit's Decision Will Unjustifiably Penalize U.S. Importers and Impede Free Trade.	5
CONCLUSION	6

TABLE OF AUTHORITIES

Statutes:

19 U.S.C. § 1673d (1982 & Supp IV 1986) 2

Trade Act of 1974, §§ 201, 406, 19 U.S.C. §§ 2251, 2436 (1982 & Supp. IV 1986) 5

Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (codified as amended at 19 U.S.C. §§ 1673-1677g) 4

Congressional Materials:

H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) . 4

Other Authorities:

General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 3

Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 3,4

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INTEREST OF AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI") represents over 1,200 American companies that are involved in the transfer of goods and services between nations. Member companies sell a broad range of products, from chemicals and electronics to table wine and footwear. The primary mission of AAEI during its 68 years of existence has been to promote fair and open international trade. An AAEI member generally will be directly involved in every proceeding in which an American manufacturer or group of workers has claimed that special countervailing or antidumping duties should be paid when merchandise is entered into the commerce of the United States. AAEI therefore has a special interest that the International Trade Commission ("ITC") determine injury in a dumping case according to statute and in a fair manner.

AAEI believes that 19 U.S.C. § 1673d (1982 & Supp. IV 1986) mandates fairly traded imports to be excluded from the ITC's material injury determination. Accordingly, AAEI members are concerned that the U.S. antidumping law be enforced properly. In this case it is AAEI's position that the ITC practice challenged in this case is not in accordance with the U.S. antidumping law and is an unjustifiable impediment to international trade.

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* As required by Rule 36 of the Supreme Court Rules, written consent for the filing of this brief was obtained from all parties. Copies of these consents are being filed concurrently herewith.

ARGUMENT

I. The ITC Is Incorrect in Using Fairly Traded Imports to Determine "Material Injury."

The Federal Circuit's decision sanctioned the ITC's practice of presuming that all imports investigated by the Department of Commerce ("Commerce") were sold at less than fair value. In its final affirmative injury determination, the ITC disregarded explicit findings by Commerce that some imports of Oil Country Tubular Goods ("OCTG") were fairly traded. As a result, the ITC's final affirmative injury determination was based, in part, on an assessment of the impact of *fairly traded* imports, in direct contravention of the antidumping law.

The U.S. antidumping law was intended to implement the antidumping code of the General Agreement on Tariffs and Trade (GATT).[1] The GATT Antidumping Code[2] requires that fairly traded goods be excluded from the causation analysis:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury . . . . There may be other factors* which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

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[1] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[2] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 [hereinafter GATT Antidumping Code].

GATT Antidumping Code at Art. 3, 31 U.S.T. at 4927. The GATT Antidumping Code defines "other factors" as follows:

> Such factors include, *inter alia*, the volume and price of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

GATT Antidumping Code, 31 U.S.T. 4927 n.5.

The House Ways and Means Committee, in its report on the Trade Agreements Act of 1979,[3] which amended U.S. law to conform it to the GATT Antidumping Code, explicitly stated that the ITC's affirmative injury determination may *not* be based on the impact of fairly traded imports:

> [M]aterial injury must be "by reason of" . . . less than fair value imports. . . . The law does not, however, contemplate that injury from such imports be weighted against other factors (*e.g.*, the volume and prices of . . . imports sold at fair value, contraction in demand or changes in patterns of consumption . . . .

H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979).

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[3] Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (codified as amended at 19 U.S.C. §§ 1673-1677g).

II. Unless Remedied by this Court, the Federal Circuit's Decision Will Unjustifiably Penalize U.S. Importers and Impede Free Trade.

The issuance of an antidumping order affects most directly U.S. importers, who are liable for the antidumping duties. Importers must deposit in cash estimated antidumping duties on all entries of products covered by the order. These cash deposits are applicable to *all* imports covered by the order regardless of whether Commerce ultimately determines, in a subsequent administrative review, that the imports were fairly traded and thus not subject to antidumping duties. Moreover, until Commerce completes its administrative review and determines the amount of duties actually owed, the importer faces an unlimited contingent liability. Completion of the administrative review can, and often does, take years. Because of these financial burdens, it is important that a U.S. business that imports merchandise can rely on the "letter" of U.S. trade law. Injury alleged to be caused by fairly traded imports should be addressed through other pertinent statutes, such as §§ 201 and 406 of the Trade Act of 1974.[4] The inclusion of fairly traded imports to decide injury in a dumping case blurs the distinction between fair trade and "unfair" trade—thereby penalizing honest U.S. importers who follow internationally acceptable practices.

To the extent that the erroneous interpretation of the antidumping law places an unreasonable burden on the import of goods into the United States, not only are American importers injured, but American exporters run the risk of being the victims of similar

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[4] 19 U.S.C. §§ 2251, 2436 (1982 & Supp. IV 1986).

unreasonable burdens abroad. The law is intended to strike a careful balance between competing goals of remedying trade practices determined to be unfair and promoting free and fair trade. The Federal Circuit's decision upholding the ITC's practice of commingling dumped and fairly traded imports in its causation analysis destroys this delicate balance and will have a significant adverse impact on American businesses that engage in international trade.

CONCLUSION

For the reasons set forth above, AAEI respectfully requests that the Petition for a Writ of Certiorari of Algoma Steel Corporation, Limited, be granted.

Respectfully submitted,

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